

ORIGINAL
RECEIVED

MAR 21 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Revision of Part 22 and Part 90) WT Docket No. 96-18
of the Commission's Rules to)
Facilitate Future Development)
of Paging Systems)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act --)
Competitive Bidding)
To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF EMERY TELEPHONE

Emery Telephone (Emery), by its attorneys and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits its comments in the above-captioned proceedings.

I. Statement Of Interest

Emery is a small independent telephone cooperative which provides local exchange telephone service in rural Utah, including Emery and Grand Counties, Utah. Emery holds radio licenses in the Rural Radiotelephone Service in order to facilitate the provision of Basic Exchange Telecommunications Radio Service (BETRS) to its rural subscribers, where local exchange telephone service cannot otherwise be provided economically by landline plant. In that the parameters of the Commission's "freeze" on the filing of applications, pending the outcome of the

No. of Copies rec'd
List ABCDE

29

rulemaking proceedings, are not entirely clear (and Emery submits that a plain reading of the captioned Notice of Proposed Rule Making (NPRM) would indicate that it is nonetheless not applicable to BETRS), Emery's subscribers would be adversely affected if the "freeze" were extended to BETRS applications. Emery is concerned that any such action would make it impossible for it to meet future demands for providing local exchange telephone service via BETRS, thereby seriously compromising universal service goals.

II. Emery Seeks Clarification That The Commission's Application Freeze Does Not Apply To BETRS.

Emery has reviewed the captioned NPRM, but is unable to determine, with any certainty, whether the Commission's application freeze is applicable to BETRS. In particular, the Commission states, at Paragraph 139, that "we are suspending acceptance of new applications for paging channels . . ." (underlining added). Later, the Commission states, in connection with the processing of pending applications, that "[w]ith respect to paging applications that were filed prior to the adoption of this Notice and that remain pending, we will process such applications provided that (1) they are not mutually exclusive with other applications as of the adoption date of this Notice, and (2) the relevant period for filing competing applications has expired as of the adoption date of this Notice." NPRM at

Para. 144. (underlining added) Finally, the ordering clause states, "IT IS FURTHER ORDERED that applications for paging licenses, . . . received after the adoption date of this Notice will be held in abeyance and not processed until further notice, except as otherwise indicated in paragraphs 139 through 148 hereof." NPRM at Para 157. (underlining added). No specific mention is made by the Commission with respect to non-paging applications, such as applications for BETRS facilities. Thus, it appears, based upon a plain reading of the NPRM and the Commission's ordering clauses, that (1) the application freeze is not applicable to BETRS applications, and therefore (2) rural telephone companies, like Emery, may continue to file applications for new central office stations in order to meet public demands for local exchange telephone service. Such interpretation would be consistent with the mandate of Congress that the Commission provide for the goal of ensuring universal telephone service to the public. See Section 1 of the Communications Act of 1934, as amended (the Act).

A. The Imposition of a BETRS Application Freeze Would Compromise Section 1 of the Act.

If the Commission intended the application freeze to apply to BETRS applications, Emery submits that this result would be patently unfair to the residents of rural America. It would disrupt the ability of small rural telephone companies to respond to their customers' requests for local

exchange telephone service in remote locations, where it is either economically not feasible or physically impossible to provide such service by wireline or fiber optic cable (e.g., because the customer to be served is too far removed from the nearest central office, or natural terrain features make it physically impossible or impracticable to lay the required copper wire or fiber optic cable).

The Commission has correctly recognized that BETRS is an extension of basic exchange telephone service, Basic Exchange Telecommunications Service, First Report and Order, 3 FCC Rcd. 214, 217 (1989), in that this service is utilized to provide local exchange telephone service by using radio loops to take the place of open wire or cable in remote areas throughout the country.¹ Id at 217. Section 1 of the Act, provides in pertinent part, that the Commission was created "for the purpose of regulating communications so as to make available, so far as possible, to all of the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . for the purpose of promoting safety of life and property through the use of wire and radio communication." (underlining added) The Commission has previously stated that, in

¹ BETRS is most often provided by small rural telephone cooperatives and commercial companies, as an adjunct to their landline local exchange telephone service.

establishing its policies and regulations, "we are guided by the mandate and fundamental statutory purpose set out in Section 1 of the Act." Competitive Common Carrier Services (Resale Deregulation), 91 FCC 2d 59, 64 (1982) (emphasis added) By imposing a freeze that would prevent rural area telephone companies, such as Emery, from providing needed local exchange telephone service, through the use of BETRS, the Commission would frustrate this fundamental mandate of Section 1 of the Act, as well as circumvent the goal of universal service, which underlies that mandate.²

Emery submits that a BETRS application freeze would thus be inimical to the universal service mandate of Section 1 of the Act.³ Given the use of BETRS as the primary means of communications for many rural area inhabitants to reach

² Universal service is "a primary goal of the Federal telecommunications policy." Effects of Federal Decisions on Universal Telephone Service, 57 RR 2d 721, 724-25 (1985). The rationale behind the goal of universal service includes both societal benefits (such as the importance of a nationwide network to the economy and our quality of life) as well as a individual benefits (such as the ability to reach an ambulance, the police or the fire department in the event of an emergency). See Id. at 726.

³ The Commission's purpose for the application freeze is to preclude further licensing during the pendency of the rulemaking proceedings so as to maximize the remaining area in each MTA that would be available for auction of paging frequencies, as proposed by the Commission. As applied to BETRS, a freeze would produce the ridiculous result that the market area paging licensees would have the ability to provide paging service (something of a luxury) to Emery's rural area subscribers, but Emery would not have the ability to provide the more basic local exchange telephone service needed to respond to a page.

help in the event of a life-safety emergency, the detrimental impact of a freeze on the acceptance of BETRS applications, especially in rural areas, would likewise frustrate the Act's "purpose of promoting safety of life and property through the use of wire and radio communication." Accordingly, Emery urges the Commission to clarify its order that the application freeze adopted does not apply to BETRS applications. Further, Emery urges the Commission to immediately process to grant, on a primary basis,⁴ any pending BETRS application received by the Commission, on or before February 8, 1996, so that it (and similarly situated carriers) can continue to meet demands for local exchange telephone service in rural areas.

B. Broadband PCS is not an Alternative to BETRS.

The Commission has proposed, in its market area licensing proposal, to include BETRS frequencies in the auctions (since these frequencies may also be used for

⁴ Grant of a BETRS application on a secondary basis would be inconsistent with Section 1 of the Act, in that a competing service (i.e., one-way paging) could disrupt a subscriber's necessary local exchange telephone service, thereby leaving the subscriber without an efficient means for obtaining assistance in the event of an emergency. Because of the public interest considerations in ensuring universal telephone service and the public's need for access to reliable emergency communications, it is respectfully submitted that the grant of all BETRS applications must be made on a co-primary basis with any other service in the band.

paging service). NPRM at Paras. 29 and 30. The Commission suggests that broadband PCS facilities will be sufficiently built out in rural areas so as to satisfy the need for local exchange service via radio. This is pure speculation by the Commission; it is not based on any evidence of record. Indeed, broadband PCS construction requirements⁵ indicate a contrary conclusion: some rural areas may not have PCS available for at least 10 years from the commencement of PCS operations, if ever. Thus, because broadband PCS will not supplant BETRS as an alternative communications source, BETRS should retain its exemption from auction, thereby precluding any purpose for a freeze on BETRS applicants.

Emery also urges the Commission, for the duration of this proceeding, to continue to accept and process BETRS applications to grant on a primary basis. Emery notes that broadband PCS is only just now becoming available in a major urban center, such as Washington, D.C., where there is substantial population density. However, in rural areas, such as Emery and Grand Counties, Utah, where the population density is 2.3 persons per square mile and 1.8 persons per square mile, respectively, the prospect of broadband PCS

⁵ Rule Section 24.203(a) provides, in pertinent part, as follows: "Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within 10 years of being licensed."

becoming available in the next several years is remote, much less during the pendency of this proceeding. This conclusion is buttressed by the Commission's broadband PCS build-out requirements in Rule Section 24.203(a) and the fact that there has been no flood of applications filed with the Commission for rural area partitioning of broadband PCS licenses to rural telephone companies, pursuant to Section 24.714(d) of the Commission's Rules.⁶ Thus, combined with the high costs of acquiring broadband PCS spectrum, Emery believes that the low level of partitioning activity exhibited thus far is indicative that broadband PCS will not be available in most rural areas for the foreseeable future, and certainly, not during the period of time that these proceedings are pending.

Further, in this regard, Emery notes that many of the rural cellular service areas are not completely built out, despite licensing that began some ten years ago. This provides further support for the likelihood that the provision of broadband PCS will likewise be delayed in rural areas. Indeed, PCS providers will have little incentive to operate in rural areas with established cellular service providers due to low population densities and the high cost

⁶ The Commission may also take official notice that Poka-Lambro Telephone Cooperative was the only rural telephone company to win a broadband PCS license in the A and B-Block auction.

of infrastructure. Accordingly, because Emery does not expect broadband PCS to be available in most rural areas for the foreseeable future, including Emery and Grant Counties, in Utah, the Commission is urged to continue licensing BETRS on a primary basis, as the primary means of providing local exchange telephone service to those subscribers who cannot be reached by conventional wire or fiber optic cable.

III. Conclusion.

The Commission should clarify that the application freeze adopted in the NPRM does not apply to BETRS applications even though such frequencies are shared, on a co-primary basis, with the Paging and Radiotelephone Service. The imposition of a freeze is inimical to the universal service mandate of Section 1 of the Act, and would be contrary to the basic purpose for creating BETRS -- to provide local exchange telephone service to the public where it is not feasible to provide the service via landline facilities. Further, the Commission is urged to continue processing all pending BETRS applications to grant on a primary, rather than a secondary basis, so that subscribers

ORIGINAL


10

may be assured of having reliable telephone communications
in the event of an emergency.

Respectfully submitted,

EMERY TELEPHONE

By 
Harold Mordkofsky


Richard D. Rubino
Its Attorneys

Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Washington, D.C. 20037
Tel: (202) 659-0830

Dated: March 1, 1996